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## Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law

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*This paper advocates for a more active role for adjudicators, one in which they provide direction to parties and actively shape the hearing process. Active adjudication can be an important access to justice tool. Without some direction and assistance from the adjudicator, growing numbers of self-represented litigants cannot meaningfully access administrative justice. Importantly, however, as the role of the adjudicator shifts, so too must our understanding of the notion of impartiality. If it is unfair to expect self-represented litigants to navigate the hearing process without adjudicative assistance and direction, it is also unfair to insist on a vision of impartiality that prevents adjudicators from actively managing the hearing process. To that end, the author develops the notion of "substantive impartiality" to show how existing legal principles can accommodate a more active role for the administrative adjudicator. The author also makes practical recommendations and suggests how administrative tribunals can help self-represented litigants understand the principles and procedures related to bias allegations.*

*L'auteure soumet que les adjudicateurs doivent jouer un rôle plus actif, ce qui comprend donner des directives aux parties et intervenir pour donner forme au processus d'audience. L'adjudication active peut constituer un important mécanisme d'accès à la justice. Sans directives ni aide de la part de l'adjudicateur, un nombre croissant de parties qui se représentent elles-mêmes ne peuvent avoir un accès raisonnable à la justice administrative. Il importe de souligner cependant que lorsque le rôle de l'adjudicateur change, notre vision du concept d'impartialité doit aussi changer. Il n'est pas juste de s'attendre à ce que des parties qui se représentent elles-mêmes puissent participer au processus d'audience sans aide ou sans directives, tout comme il n'est pas juste d'insister sur une vision de l'impartialité qui empêche les arbitres de gérer activement ce processus. À cette fin, l'auteure élabore le concept d'« impartialité substantive » (substantive impartiality) pour illustrer comment les principes de droit existants peuvent accueillir un rôle plus actif pour l'arbitre administratif. L'auteure formule également des recommandations plus pratiques et propose des façons pour les tribunaux administratifs d'aider les litigants qui se représentent eux-mêmes à comprendre les procédures et les principes associés à l'impartialité.*

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*Introduction*

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*Introduction*

This piece draws on my own experience as a human rights adjudicator, at a tribunal in which many parties represent themselves.<sup>1</sup> As they engage in litigation, I have noticed that self-represented parties often form their own views of the appropriate role of adjudicators and whether those adjudicators are fairly considering the case. At times, the views formulated by self-represented litigants fit awkwardly within the existing legal paradigm. The resulting disparity between how the law defines the role of the adjudicator, however ambiguously, and how some self-represented litigants view that role can lead to a host of issues, including fairness concerns, bias allegations, and hearing management problems.

These issues are particularly important in light of both growing numbers of self-represented litigants and recent trends towards more active adjudication. For a number of administrative tribunals, self-

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1. Social Justice Tribunals Ontario, "2013–2014 Annual Report," (SJTO, 2015), online: <[www.sjto.gov.on.ca/documents/sjto/2013-14%20Annual%20Report.pdf?171751](http://www.sjto.gov.on.ca/documents/sjto/2013-14%20Annual%20Report.pdf?171751)>. This statistic refers to representation at the time of mediation. The Human Rights Tribunal of Ontario (Tribunal) does not publish statistics regarding representation at later stages of the proceeding. The Tribunal was revamped in 2008 and designed with self-represented litigants in mind. Indeed, the Ontario *Human Rights Code*, RSO 1990, c H.19, s 40 [HRC] explicitly provides for "active adjudication" and the Tribunal rules and adjudicative approach encourage fair, just and expeditious resolution of human rights applications.

representation is the norm.<sup>2</sup> In the hopes of making administrative justice more accessible for these litigants, many administrative tribunals have been reconsidering how they operate, and this can include rethinking the role of the adjudicator.<sup>3</sup> In this piece, I argue that active adjudication is an important tool to promote both fairness and efficiency in administrative justice. However, as the role of the adjudicator shifts, so too must our understanding of the notion of impartiality. As the adjudicative model adjusts to meet the needs of increasing numbers of self-represented litigants, the legal boundaries that define the adjudicator's role must adjust commensurately.

In a number of tribunals, the adjudicative model has begun to shift from a more traditional,<sup>4</sup> passive approach to one in which decision-makers

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2. . This has also been the case in some levels of court. See, e.g., André Gallant, "The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions" (2005) 53:2 Can Tax J 333. In Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30:2 Queen's LJ 825 at 826-827, the author cites data compiled by the Ontario Ministry of the Attorney General, which show that in 2003, 43.2% of applicants in the Family Court Division of the Ontario Court of Justice were not represented by counsel when they first filed with the court. The average percentage of unrepresented litigants in Ontario family courts between 1998 and 2003 was 46%.

3. Michelle Flaherty, "Self-Represented Litigants: A Sea Change in Adjudication" in Graham Mayeda & Peter Oliver, eds, *Principles and Pragmatism: Essays in Honour of Louise Charron* (Markham: LexisNexis Canada, 2014) 323; Cynthia Gray, "Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants" (2007) 27:1 J National Assoc Administrative L Judiciary 97; Stephan Landsman, "Pro Se Litigation" (2012) 8 Annual Rev L & Social Science 231; Samantha Green & Lorne Sossin, "Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy" in Laverne Jacobs & Sasha Baglay, eds, *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Burlington, VT: Ashgate, 2013) 71. There has also been a growing discussion about the role of judges dealing with self-represented litigants and the importance of access to justice more generally. See *Hryniak v Mauldin*, 2014 SCC 7 at para 27, [2014] 1 SCR 87; *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59, [2014] 3 SCR 31; "Courts and the Self-Represented: The Road Ahead," Editorial, (2001) 84:6 *Judicature* 300; Bonnie Rose Hough & Justice Laurie D Zelon, "Self-Represented Litigants: Challenges and Opportunities for Access to Justice" (2008) 47:3 *Judges' J* 30; Marla N Greenstein, "Judges' Responsibilities to Pro Se Litigants" (2008) 47:3 *Judges' J* 46; Jona Goldschmidt, "Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience" (2008-2009) 17:3 *MSU-DCL J Intl L & Prac* 601. Gray, *supra* note 3; National Self-Represented Litigants Project, *Working With Self-Represented Litigants: Ideas and Suggestions From the Bench* (Windsor, ON: University of Windsor, 2014), online: NSRLP <representingyourselfcanada.com>

4. I refer to the passive style of adjudication in which decision-makers determine outcomes based on the evidence, as it is presented by the parties or their representatives as the "traditional" model of adjudication. As approaches to adjudication have varied over time, it is perhaps a misnomer to refer to any particular adjudicative style as "traditional." However, for the purposes of this piece, "traditional" refers to the passive model of adjudication in which decision-makers play a passive role and determine the legal issues based on the evidence presented by the parties or their representatives. This approach has been the most prominent approach to adjudication in recent times and would generally be understood by lawyers practicing today as the typical or traditional model of adjudication. See, e.g., the *HRC*, *supra* note 1, s 43(3), which identifies a number of "non-traditional" adjudicative tools, which contemplate a more directive and active role for adjudicators.

more actively adjudicate cases and direct the course of the proceedings.<sup>5</sup> In many instances, this shift arises out of recognition that, without some assistance and direction from the adjudicator, many self-represented parties cannot meaningfully access the justice system.<sup>6</sup> However, engaging in more active and directive styles of adjudication is not without pitfalls. Adjudicators must walk a very fine line. The jurisprudence tells us that although we assist parties so that they can access the legal process, we must not help (or be perceived to help) them *too much*. Decisions are overturned both because a decision-maker has failed to provide a sufficient level of assistance<sup>7</sup> and because the decision-maker has provided a level of assistance that gives rise to a reasonable apprehension of bias.<sup>8</sup> The challenge is to find the sweet spot that lies between enough help to ensure meaningful access to adjudication but not so much help as to create a reasonable apprehension of bias. As we shall see in the jurisprudence, adjudicators sometimes struggle as they apply legal principles to define their role. Not surprisingly, understanding the role of the adjudicator presents even more of a challenge for the self-represented litigant, for whom the applicable principles can seem both legalistic, but also flexible to the point of arbitrariness.

This paper begins by describing the shift in adjudicative approach and setting out recent developments that have led adjudicators to play a more active role in shaping the hearing process and assisting self-represented litigants. Next, I consider the challenge of defining the scope and content of the impartiality obligations in light of these new approaches to adjudication. Finally, I look at the jurisprudential treatment of bias applications by self-represented litigants and consider whether any trends emerge from this jurisprudence, both in terms of what self-represented

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5. While the focus of this piece is administrative tribunals, it is worth noting that similar measures are also being considered and adopted in some courts. For example, judges are also assisting self-represented litigants by explaining the rules to them, applying them with more flexibility, and raising evidentiary and substantive issues: Engler, *infra* note 23.

6. Lorne Sossin & Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice?" (2012) 12:1 OUCJLJ 157; Michael Gottheil & Doug Ewart, "Improving Access to Justice through International Dialogue: Lessons for and from Ontario's Cluster Approach to Tribunal Efficiency and Effectiveness" (Paper delivered at the 2010 Australian Conference of Planning and Environmental Courts and Tribunals) [unpublished], online: ELTO <www.elto.gov.on.ca>.

7. *Kainz v Potter* (2006), 33 RFL (6th) 62 (Ont Sup Ct); *Audmax Inc v Ontario (Human Rights Tribunal)*, 2011 ONSC 35, 328 DLR (4th) 506; *Toronto-Dominion Bank v Hylton*, 2010 ONCA 752, 270 OAC 98.

8. *Limoges v Investors Group Financial Services Inc*, 2003 ABQB 757, 125 ACWS (3d) 255 [*Limoges*]; *Tran v Financial Debt Recovery Ltd* (2001), 40 CCLT (3d) 106 (Ont Sup Ct) [*Tran*].

litigants perceive to be partial treatment by adjudicators and how these concerns can be addressed.

I. *Active adjudication: Its role in ensuring fair hearings for self-represented litigants*

Many administrative tribunals contend with significant numbers of self-represented litigants. This reality has influenced much about how those tribunals were designed and how they operate, including the formulation of their rules and the development of their administrative and adjudicative practices. Indeed, as many administrative tribunals have already recognized, access to justice issues must be considered from the perspective of litigants, including those who are self-represented.<sup>9</sup> Their perception is key because, as Roderick Macdonald put it, “the law requires citizens to come to it, not the reverse.”<sup>10</sup> Litigants who view the administrative justice system as unfair or inaccessible may question the legitimacy of the outcome or may elect not to engage with the justice system at all.<sup>11</sup>

How do self-represented litigants perceive the justice system and do they feel they can meaningfully access it? Recent empirical research shows that most self-represented litigants approach legal proceedings with a great deal of anxiety and trepidation.<sup>12</sup> They perceive themselves to be disadvantaged by their lack of legal training and feel lost, excluded, and isolated within the legal process.<sup>13</sup> They are uncomfortable and fear being the only person in the room without legal training, the only one who does not grasp procedural steps or legal jargon. The effect can be devastating: self-represented litigants often feel that the rules prevent them from telling their story and, as a result, many self-represented litigants exit the justice system with diminished confidence in its fairness and the legitimacy of its outcomes.<sup>14</sup>

Self-represented litigants are also highly sensitive to fairness issues and often perceive the justice system, with its rules and formalities, as

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9. Gottheil & Ewart, *supra* note 6.

10. Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 27.

11. The Right Honourable Beverley McLachlin, “The Challenges We Face” (Remarks delivered at the Empire Club of Canada, Toronto, 8 March 2007) [unpublished], online: SCC <[www.scc-csc.gc.ca/](http://www.scc-csc.gc.ca/)>.

12. Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report* (2013), Report prepared for the Law Foundation of Ontario, the Law Foundation of Alberta, and the Law Foundation of British Columbia/Legal Services Society of British Columbia at 96, online: LSUC <[www.lsuc.on.ca](http://www.lsuc.on.ca)>.

13. *Ibid.*

14. Gray, *supra* note 3 at 106-107.

designed to favour represented parties. Self-represented litigants are concerned about any differential treatment by an adjudicator, even where that treatment is, at its root, designed to assist them. Particularly where they both have legal training or experience, the adjudicator and counsel appear to share a paradigm and have a similar vision of the legal issues or the steps in the proceeding. This can lead self-represented litigants to suspect collusion between the adjudicator and counsel.

The reverse is also true: represented parties express discomfort or dissatisfaction with a process in which they perceive the adjudicator to be assisting the unrepresented party.<sup>15</sup> They often feel adjudicators give too much leeway to self-represented parties or become so involved in the presentation of their cases as to create a reasonable apprehension of bias.<sup>16</sup> Counsel and decision-makers have expressed frustration at having to deal with self-represented parties because they lack knowledge and fail to adhere to procedural and substantive rules. Some lament that proceedings involving self-represented litigants take longer to wend their way through the legal process, which drains adjudicative and other resources.<sup>17</sup>

#### 1. *The challenge of passive adjudication*

Traditionally, our justice system has been adversarial in nature; it relies on each party to present the material evidence, identify the key legal issues, and provide submissions.<sup>18</sup> This model of adjudication assumes that the parties understand the complex and nuanced rules governing the framing and presentation of their respective cases.<sup>19</sup> In essence, it assumes that each party will have legal representation or, at the very least, the means, knowledge and ability to effectively represent themselves.<sup>20</sup> Passive approaches to adjudication, typical of much of our justice system, can be ineffective where parties do not have legal representation or the ability to navigate complex legal rules and systems on their own.

15. See Lorne D Bertrand et al, "Self-Represented Litigants in Family Law Disputes: Views of Alberta Lawyers" (2012), Report prepared for the Canadian Research Institute for Law and the Family at 12, online: <[www.crlf.ca](http://www.crlf.ca)>.

16. See, e.g., *Shemou v ING Insurance Co of Canada*, [2007] OFSCD No 157.

17. See, e.g., Gary Joseph, "Don't Encourage Self-Represented Litigants," Letter to the Editor, *The Law Times* (3 June 2013), online: Law Times <[www.lawtimesnews.com/201306033257/letters-to-the-editor/don-t-encourage-self-represented-litigants](http://www.lawtimesnews.com/201306033257/letters-to-the-editor/don-t-encourage-self-represented-litigants)>.

18. Flaherty, *supra* note 3; Landsman, *supra* note 3 at 232; Green & Sossin, *supra* note 3 at 73; MacDonald, *supra* note 10 at 59.

19. Traditionally, the adversarial model has been contrasted with the non-adversarial or inquisitorial process. Green and Sossin describe the standard inquisitorial process in Canada as one in which the decision-maker plays a truth-seeking role and is more concerned with investigations and findings than adjudication. Typically, the decision-maker possesses powers to obtain evidence, testimony, and other relevant information. See Green & Sossin, *supra* note 3 at 74-75.

20. Landsman, *supra* note 3 at 232.

Importantly, the adversarial model becomes less effective where (as is increasingly the case) parties represent themselves. Where the law, the rules of procedure, and the legal processes are unintelligible or unfamiliar to one or more of the litigants, cases stop being a dialogue between informed and experienced participants within a framework designed to test evidence and facilitate truth seeking. Instead, cases turn into a frustrating exercise in imposing legal norms on parties who do not grasp their significance, and who see them as arbitrary, unfair, or simply unintelligible.<sup>21</sup>

Self-represented litigants encounter an array of challenges within our legal system.<sup>22</sup> Where they cannot understand and apply legal principles or navigate legal processes, self-represented litigants are at a distinct disadvantage compared with represented parties. Passive adjudication can perpetuate that disadvantage. Without some form of direction and assistance, many self-represented litigants do not appreciate the legal tests or standards they must meet. This, in turn, makes it difficult for them to determine what evidence they should present and which arguments might advance their case. Litigation can become akin to donning a blindfold and hoping for the best. The legal outcome of proceedings may depend on whether the litigants have mastered legal rules and processes rather than whether their case has merit.<sup>23</sup>

## 2. *Rethinking the adjudicative role*

Much of the early discourse on access to justice focussed on providing access to counsel. However, legislators and courts have shown little willingness to fund widespread legal assistance or to create a right to counsel.<sup>24</sup> Self-representation is here to stay. Rather than think of self-representation as part of the problem, reality demands that we consider self-represented litigants as an important part of any solution to the problem of access to justice. Indeed, the historical roots of many parts of our administrative justice system lie in a desire to make justice accessible

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21. Flaherty, *supra* note 3.

22. Macfarlane, *supra* note 12.

23. Paula Hannaford-Agor & Nicole Mott, "Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations" (2003) 24:2 Justice System J 163 at 178; Russell Engler, "And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks" (1999) 67:5 Fordham L Rev 1987 at 1987. While it is beyond the scope of this paper to do so, the fact that I am advocating for active adjudication does call out for a more detailed consideration of the shortcomings of passive adjudication. More specifically, it bears looking at the harms active adjudication is designed to address, particularly in the case of self-represented litigants. I intend to consider some of these issues in a subsequent work.

24. *British Columbia (AG) v Christie*, 2007 SCC 21, [2007] 1 SCR 873. See also Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2008) 25 NJCL 191.



to people who could not afford to bring their disputes to court.<sup>25</sup> However, our administrative justice system has tended to import some of the features of the court system. Over the years, we have fallen very easily into a pattern of using the judicial model of adjudication as the basis for our understanding of a fair hearing. As we have seen, however, this judicial model of adjudication is not effective in contexts where representation is the exception rather than the norm. Increasing numbers of self-represented litigants calls into question whether the judicial model of adjudication is the most appropriate way to adjudicate administrative law matters.

An example may help illustrate why change is necessary. Self-represented litigants often view similar fact and good character evidence as their “smoking gun” and are sometimes unwilling or unable to understand that it is not admissible under the rules of evidence. Procedural and evidentiary rulings that may be obvious to counsel and adjudicators can seem fundamentally unfair to self-represented litigants. There are legitimate reasons for the law to treat good character and similar fact evidence the way it does. The difficulty arises in conveying those reasons to self-represented litigants in a way that is intelligible to them, and that does not undermine their confidence in the proceeding or the administrative justice system as a whole.

I and other adjudicators to whom I have spoken have often faced circumstances where a self-represented litigant arrives at a hearing with a number of friends and neighbours, whom he says can testify as to their own negative experiences with the respondent. This litigant is convinced that the evidence of these witnesses will compellingly establish that the respondent has discriminated against others and therefore also discriminated against him. Typically, at some early stage of the hearing, an adjudicator will hold that this evidence is inadmissible, and that the tribunal’s role is to determine his complaint (not those of the complaints of the individuals in entourage). While this type of ruling is generally appropriate, it can be off-putting for the self-represented litigant and can set a difficult tone for the remainder of the hearing. Among other things, the ruling may embarrass the litigant in front of his friends and neighbours and may leave him feeling that his most important evidence has been excluded for reasons that simply do not make sense to him.

A case from my own adjudicative experience with the Human Rights Tribunal of Ontario may illustrate how active adjudication can help

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25. Lorne Sossin, “Access to Administrative Justice and Other Worries” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) 211.

address some of these perceptions. In my matter, the respondent and all seven applicants were self-represented<sup>26</sup> and the case cried out for an innovative and interventionist approach to adjudication. Had I adopted a passive approach, entering the hearing room and simply advising the parties to “Please begin,” the hearing might have taken several days. More importantly, it is not clear to me that (without direction and assistance) those parties could have presented their case in a way that I could have meaningfully adjudicated it.

An important feature of the Human Rights Tribunal of Ontario is that its enabling statute allows the Tribunal to adopt “alternatives to traditional adjudicative or adversarial procedures” in order to “facilitate fair, just and expeditious resolutions of the merits of matters before it.”<sup>27</sup> While the legislation does not define “alternatives to traditional adjudicative or adversarial procedures,” it specifically authorizes the Tribunal to (among other things) question witnesses, determine the order of evidence, and define and narrow issues.<sup>28</sup>

In this particular case, I began the hearing by setting out my understanding of the legal issues. I invited the parties to make submissions to clarify or reformulate those issues. I then explained to the parties how I intended to conduct the hearing and I gave them an opportunity to make comments and pose questions about the proposed hearing process. After some discussion and clarification, all parties consented to the non-traditional hearing approach I had proposed.

Rather than inviting witnesses to testify one at a time, I held a roundtable discussion and dealt with each of the factual issues chronologically. After this discussion, in which I often posed questions to the witnesses, the opposing party had an opportunity to pose additional questions. Each witness had a chance to provide evidence on each issue. The hearing took approximately two hours. Although all of the parties may not be satisfied with the decision, I believe they left the hearing satisfied that they were

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26. *Gilbert v 2093132 Ontario*, 2011 HRTO 672.

27. *HRC*, *supra* note 1, s 41.

28. *Ibid.*, s 43(3). Although similar, these powers are different from case management. Case management aims to expedite the legal process by streamlining a case and imposing time limits for litigation. It offers parties an opportunity to narrow or consolidate issues or to settle so that resources are most efficiently allocated (Ontario, Attorney General, “Fact Sheet: Civil Case Management under Rule 77 of the *Rules of Civil Procedure*,” (Ministry of the Attorney General, 2015), online: <[www.attorneygeneral.jus.gov.on.ca/](http://www.attorneygeneral.jus.gov.on.ca/)>). Effective case management can certainly be a feature of active adjudication. However, active adjudication may be much broader than case management and can (for example) involve a narrowing of issues by the adjudicator (rather than the parties), more interventionist adjudicative involvement in the presentation of the evidence, and the questioning of the witness.

treated fairly, that they were heard, and that their case would be evaluated based on its merits.<sup>29</sup>

This is but one example of what appears to be a growing trend in administrative adjudication. Increasing numbers of self-represented litigants within the administrative justice system call for innovation in adjudication. They also raise a host of questions:

- What impact should the rising numbers of self-represented litigants have on the role of the administrative decision-makers?
- What steps should administrative decision-makers take to address the needs of self-represented litigants?
- Are there ways to ensure that self-represented litigants can meaningfully access the administrative justice system?
- Can we do this in a way that ensures that all parties (whether or not they are represented) are treated fairly?
- Finally, how can we do this in a way that recognizes the particular needs of self-represented litigants but that all parties perceive to be fair and impartial?

It would be an overstatement to suggest that administrative tribunals and decision-makers have responded to these issues in a cohesive or universal way. However, I posit that there have been two main and overlapping trends: adjudicative assistance and active adjudication. Each of these trends involves a shift away from passive adjudication and, potentially, each raises issues about the perceived impartiality of the adjudicator. While we will consider each of these trends in turn, it is important to note that it is not always possible to draw a crisp line between what is meant by adjudicative assistance and active adjudication. In hearing any given case, an adjudicator may employ one or both of these approaches.

### 3. *Adjudicative assistance for the self-represented litigant*

Adjudicative assistance involves providing information, taking steps or giving directions to help one or both of the parties meaningfully access the adjudicative process.<sup>30</sup> Importantly, in this sense, “assistance” is not about helping one or the other party succeed; rather, it is about ensuring that all parties (whether represented or not) have a fair opportunity to present their case. Indeed, it is critical to distinguish between the two. Situations where the adjudicator guides the parties, helping them to understand

29. I note that this type of approach will not be appropriate in every circumstance. It may be particularly suitable where at least one party is unrepresented, where the adjudicator has subject matter expertise, and where more traditional forms of adjudication would make it difficult for one or more of the parties to present its case.

30. *Dauids v Dauids* (1999), 125 OAC 375 at para 36 [*Dauids*].

and apply the legal and procedural rules, which I have referred to as “assistance,” is properly part of the adjudicator’s role. On the other hand, it is not appropriate for the adjudicator to give the impression he or she is advocating for or against a particular party—this could lead to a finding of bias.

Of course, in providing assistance, the adjudicator may also take on a more active role; however, he or she will not necessarily take control of or direct the hearing process. Parties may be left to control and present their own case, but they will receive some measure of assistance as they do so.<sup>31</sup> For example, an adjudicator may assist a self-represented party by explaining the rules of evidence, by applying those rules with greater flexibility, or by alerting the party to an issue it had not raised on its own. There have been a number of significant decisions, including from appellate courts, directing adjudicators to provide some measure of assistance to self-represented litigants.<sup>32</sup> This jurisprudence has led to a key, albeit incremental shift in the role of the adjudicator. It also raises important issues about impartiality.

The trend towards adjudicative assistance arose out of fairness concerns and a realization that, absent some help, many self-represented parties cannot navigate the legal system or present their case in a way that it can be meaningfully adjudicated. For example, can a hearing really be

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31. See *Universal Workers Union v Ontario (Human Rights Commission)* (2006), 39 Admin LR (4th) 285 (Ont Sup Ct) [*Universal Workers*]. This case involved allegations of discrimination by a member against his union. Partway into the hearing, the Tribunal allowed the applicant to amend the pleadings to include several additional allegations. The Tribunal then directed parties to present the evidence of specific witnesses whom those parties would not otherwise have chosen to call. The union objected, arguing that procedural fairness entitled it to present its own case, without interference from the Tribunal. The Divisional Court agreed and quashed the Tribunal’s order directing parties to present specific witnesses. It held that the principles of procedural fairness contemplate an adversarial model and that the Tribunal had breached those principles by adopting an inquisitorial approach to the hearing. It is noteworthy that, in reaching this conclusion, the Divisional Court relied on *R v Swain*, [1991] 1 SCR 933, a criminal law case, where the Supreme Court of Canada explained that the criminal justice system is an adversarial one. See also *R v Switzer*, 2014 ABCA 129, 572 AR 311. In *Universal Workers*, the Divisional Court integrated this principle into administrative law without further analysis. It is also noteworthy that *Universal Workers* pre-dates the amendments to the *HRC*, *supra* note 1, which specifically provide for non-traditional adjudicative methods. It is unclear how more inquisitorial measures would be dealt with post-amendment, particularly as the *HRC* now gives the Tribunal powers that are, essentially, inquisitorial in nature. Section 43 authorizes the Tribunal to require a party to produce documents, information, evidence and witnesses who are reasonably within the party’s control. Despite these statutory powers, the Tribunal has not tended to be inquisitorial or to direct parties to adduce evidence they would not otherwise have called.

32. Flaherty, *supra* note 3. See *Dauids*, *supra* note 30 at para 36. See also *Baziuk v BDO Dunwoody Ward Mallette* (1979), 13 CPC (4th) 156 at para 18 (Ont Ct J (Gen Div)); *Barrett v Layton* (2004), 69 OR (3d) 384 (Sup Ct) [*Barrett*]; *Manitoba (Director of Child and Family Services) v JA*, 2006 MBCA 44, 205 Man R (2d) 50; *R v Rice*, 2011 ONSC 5532, 97 WCB (2d) 338; *R v McGibbon* (1988), 31 OAC 10.

fair if the self-represented party cannot frame the issues in dispute in terms of the legal test or cannot appreciate what she needs to prove in order to be successful?<sup>33</sup> These considerations have led adjudicators to provide assistance to litigants, ranging from help that is purely procedural in nature (explaining the rules of procedure and how the hearing will unfold) to that which is more substantive (including identifying issues that have not been raised by the parties).

Indeed, the jurisprudence now recognizes that an adjudicator plays some role, if not in leveling the playing field for self-represented litigants, then at least in creating a climate in which they can present their cases to the best of their abilities. Clearly, adjudicators cannot and should not be a substitute for representation. No matter how much assistance they receive from the adjudicator, self-represented litigants will never have the same advantages as parties that are expertly represented. Arguably, this illustrates the limitations of active adjudication and calls out for a broader rethinking of how we approach adjudication: can a complex rule-based system ever be fully accessed without expert representation, no matter how hard adjudicators work at improving strategies?<sup>34</sup>

Although they cannot fully compensate for representation, adjudicators should be mindful of the role they can play in addressing some of the needs and challenges faced by self-represented litigants. It is often unclear what exactly this role is in practice and there has been considerable debate as to the scope and type of assistance an adjudicator can provide.<sup>35</sup> It can be difficult to determine how much help is too much, as a great deal depends on the context, the nature of the case, and the abilities of the litigants. As I will discuss in more detail, notions of fairness and impartiality are important factors that can help determine the appropriate limits on adjudicative assistance.

#### 4. *Active adjudication*

Generally speaking, active adjudication involves the adjudicator actively shaping or directing the hearing process. Rather than leaving the presentation of the case entirely to the parties, the active adjudicator provides some measure of direction. An active adjudicator might, for example, dispense with opening statements, frame the legal issues for the parties and then invite them to comment or make submissions on how the

33. Macdonald, *supra* note 10; Barrett, *supra* note 32.

34. I hope to address this issue in future research about alternatives for dispute resolution in the administrative setting, including mediation-adjudication. By shifting our approach to determining issues away from reliance on complex rules, we may enhance parties' ability to meaningfully and fairly present their cases.

35. Flaherty, *supra* note 3.

legal issues have been framed. An active adjudicator might also direct the order in which the parties will present evidence.

For example, where one or more of the parties is self-represented, I generally do away with opening statements. In part, I and others do this because self-represented litigants often have great difficulty distinguishing between an opening statement and evidence. It can be impossible for them to talk about their case, even in general terms, without effectively providing evidence (even though they are not under oath). Instead, I begin hearings by summarizing my understanding of the legal and factual issues in dispute based on the pleadings. I then invite the parties to provide clarifications or make submissions on issues they feel I have misunderstood or not identified. The practice often makes for a more efficient hearing: it avoids the need to explain the subtle difference between argument and evidence to self-represented litigants. It also helps both parties frame the issues and understand what they need to establish in order to succeed.

Active adjudication can have the overall impact of assisting one or more of the parties, particularly those who are self-represented and might have difficulty navigating a legal process without such direction. However, although it may be the corollary effect, the objective of active adjudication is not necessarily to help any particular party access justice, but rather to create a process that is fair and accessible to all parties. Active adjudication attempts to eliminate or at least mitigate some of what has traditionally made lawyers indispensable to the proper functioning of the hearing. Arguably, the advantages of active adjudication extend beyond self-represented litigants: active adjudication can lead to a more efficient and timely proceeding in which each party has nevertheless had a fair opportunity to present its case.<sup>36</sup>

Active adjudication can take on different degrees, ranging from the adjudicator who provides directions concerning the order of the proceeding to one who raises legal issues and takes the lead in questioning witnesses. The degree of adjudicator involvement or activity will depend on factors such as the tribunal's statutory powers, the style of the adjudicator, the

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36. Gottheil & Ewart, *supra* note 6. Consider, for example, cases where one party is represented and the other is not. Active adjudication can help the parties frame the issues in the case, manage the evidence and administer the proceeding in a way that avoids unnecessarily prolonged hearings, which in turn can limit the legal costs of the opposing party and be a more efficient use of adjudicative resources.

needs of the parties, the issues at stake, and the nature of the proposed evidence.<sup>37</sup>

Lorne Sossin describes active adjudication as a sort of midway point between the adversarial and inquisitorial models of adjudication.<sup>38</sup> As we have seen, the adversarial model is characterized by minimal adjudicative intervention and control of the proceeding by the parties. Conversely, under an inquisitorial model, the tribunal controls the proceeding and takes the lead in eliciting information. Inquisitorial decision-makers often have a range of statutory powers that allow them to call evidence and engage in independent fact-finding.<sup>39</sup> Active adjudication has many features of the adversarial model, but also some of the characteristics of an inquiry-based process. For example, as with the adversarial process, the parties to an active adjudication remain responsible for adducing evidence. An active adjudicator does not engage in independent fact-finding. An active adjudicator may take the lead in questioning witnesses, although parties retain the ability to ask questions also, subject to adjudicative direction regarding the order of witnesses and the scope of questioning.

In some cases, the ability to actively adjudicate will flow explicitly from statute. As we have seen, this is the case with the Ontario *Human Rights Code*, which specifically contemplates “alternatives to traditional adjudicative or adversarial procedures.”<sup>40</sup> Among the tribunal’s statutory powers are the ability to define or narrow the issues required to dispose of an application and limit the evidence and submissions of the parties on such issues, determine the order in which the issues and evidence in a proceeding will be presented, and conduct examinations in chief or cross-examinations of a witness.<sup>41</sup>

In other cases, a tribunal may move towards active adjudication of its own initiative and without any specific grant of statutory authority. The Environmental Review Tribunal (ERT) is a good example of this. It has no specific statutory power to actively adjudicate.<sup>42</sup> Moreover, it is

37. See Green & Sossin, *supra* note 3 at 74. See also Ontario, Attorney General, *Report of the Ontario Human Rights Review, 2012*, by Andrew Pinto (Queen’s Printer for Ontario, 2012) at 66-67 [Pinto].

38. Green & Sossin, *supra* note 3 at 71.

39. An inquisitorial model is more common under the civil law tradition. Common law examples include commissions of public inquiry and coroner’s inquests: *ibid* at 74-75.

40. *HRC*, *supra* note 1, s 43(3)

41. The *HRC* also gives the Tribunal latitude to deviate from the *Statutory Powers Procedure Act*, RSO 1990, c S.22 [*SPPA*], legislation that sets out procedural requirements that administrative tribunals must comply with when conducting an oral hearing. Section 42(1) of the *HRC* states that the provisions of the *SPPA* apply unless they conflict with a provision of the *HRC*, the regulations or the Tribunal rules.

42. See s 142.1 of the *Environmental Protection Act*, RSO 1990, c E.19, as amended.

bound by Ontario's *Statutory Powers Procedure Act*. The *SPPA* sets out an adversarial adjudication paradigm, along with a series of procedural requirements that must be adhered to in any oral hearing held by the ERT. The ERT introduced active adjudication by amending its rules of procedure in a number of ways that continue to comply with the *SPPA*, but also support a more active approach to adjudication.<sup>43</sup>

Active adjudication has the advantage of being flexible and easily adaptable to the nature of the question and the needs and relative abilities of the parties. However, with flexibility comes uncertainty. While rules of procedure, guidelines and practice directions can alert parties to a tribunal's use of active adjudication, it is sometimes difficult for even the adjudicator to gauge just how actively she will be involved in the case until the hearing process begins. For example, a party appearing before the ERT or the Human Rights Tribunal of Ontario may expect some degree of active adjudication. However, that party cannot necessarily anticipate just how active the adjudication will be. Will the tribunal member question witnesses or will that be left to the parties and their representatives? Should the parties ensure that all witnesses are present at the outset of the hearing, just in case the tribunal directs them to testify in a particular order? This uncertainty can pose challenges for all parties, who may feel uncomfortable with the process and how to prepare for it.

Represented parties, in particular, have expressed concern that active adjudication may be problematic, particularly as it might compromise adjudicators' impartiality.<sup>44</sup> Indeed, when the Ontario *Human Rights Code* amendments came into effect in 2008, some members of the legal community questioned whether active adjudication "would tip into unfairness by Tribunal members directing how hearings should proceed

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43. For a more detailed discussion, see Gottheil & Ewart, *supra* note 6. The ERT's rules state that the Tribunal may: identify and narrow issues, determine the order in which evidence will be presented; question witnesses; and, limit the time allotted for the parties' questioning of witnesses, as well as the time permitted for making submissions in Rules 179-185. The purpose of this paper is not to discuss in depth the procedural fairness issues that may arise in active adjudication. However, it bears noting that, although the ERT rules have not been the subject of judicial review, courts have upheld active adjudicative practices introduced through rules of procedure in other cases (see *Canada (Citizenship and Immigration) v Thamoitharem*, 2007 FCA 198, [2008] 1 FCR 385 [*Thamoitharem*])). See also Leonard Marvy & David A Wright, "'Master of Its Own House': Procedural Fairness and Deference to Ontario Labour Relations Board Procedure: Case Comment on *International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electrical Workers and Amalgamated Transit Union Local 113 v. Ontario Labour Relations Board*" (2008) 21 Can J Admin L & Prac 361.

44. Pinto, *supra* note 37 at 66.



in an improper or biased manner.”<sup>45</sup> However, in a review of the Ontario human rights system, conducted three years after the amendments, Andrew Pinto found “little evidence of this” and, in fact, recommended that the Tribunal make even more use of active adjudication.<sup>46</sup>

Pinto does not explain why active adjudication appears to be working at the Human Rights Tribunal of Ontario. I posit that it has much to do with the parties’ perception that the Tribunal’s more active and directive approach allows it to fairly determine disputes. A number of factors likely informed and led to the success of the Tribunal’s approach: its adjudicators have human rights expertise; the overwhelming number of parties appearing before the Human Rights Tribunal of Ontario are unrepresented; and, traditional adjudicative methods would often be ineffective in this context.

The concerns initially expressed about the Human Rights Tribunal of Ontario’s active adjudication have turned out to be largely theoretical. The reviewer found that parties (whether represented or not) have not tended to perceive the Tribunal’s more active role as unfair or biased. The reviewer’s positive assessment of active adjudication appears to be based on an absence of complaints, and while this approach served the reviewer’s purpose, it does not give much guidance to adjudicators or parties. It is important to get beyond the complaint test and begin to assess, in a principled manner, whether adjudicators’ expanding roles and non-traditional adjudicative practices raise concerns about unfairness or impartiality.

## II. *Substantive impartiality*

We have seen that some administrative adjudicators are moving away from the traditional passive, adversarial model of adjudication and becoming more active and directive participants in the legal proceeding. How is this more active and directive role to be reconciled with the decision-maker’s duty to determine cases fairly and impartially? How much direction and assistance can adjudicators provide before crossing the line and descending into the so-called arena of litigation? Does the existing legal test for impartiality accommodate the changing adjudicative role?

45. *Ibid.* See also Accessibility for Ontarians with Disabilities Act Alliance, “Analysis of the November 2012 Final Report of the Andrew Pinto Review of Ontario’s New System for Enforcing Human Rights in Ontario: Damning Findings of a Human Rights Enforcement System in Trouble, Wrongly Papered Over as a ‘Qualified Success’” (AODA, 12 November 2012) at 26, online: <[www.aoda.ca](http://www.aoda.ca)>.

46. Pinto, *supra* note 37 at 66.

The impartiality of the adjudicator is a cornerstone of the legal system and a key component of procedural fairness.<sup>47</sup> Procedural fairness has two dimensions: the right to a hearing and the right to have that hearing conducted by an impartial decision-maker. There are a number of different ways in which a decision-maker may become partial—she may have a personal stake in the outcome of the case, the tribunal itself may not be sufficiently independent, or the decision-maker may behave or make comments that suggest she is not approaching the dispute with an open mind.<sup>48</sup> This piece focuses on a different aspect of impartiality, namely, whether an adjudicator will be perceived as biased because she is assisting the parties or directing the conduct of the hearing. In this section, we will consider whether decision-makers can maintain their impartiality while providing direction and adjudicating actively.

Impartiality has been characterized as a “legal boundary,” a line that decision-makers may not cross without undermining the fairness of the proceedings.<sup>49</sup> Not only does an impartial process lead to more legitimate legal outcomes, it is also necessary to foster credibility in the administrative justice system and to promote voluntary compliance with decisions. Decision-makers’ authority rests on the public’s confidence in the decision-making process and the legal system in general.<sup>50</sup> To believe in the system and be prepared to accept decisions with which they may disagree, parties must feel that their cases are being determined fairly, by an open-minded adjudicator who has no personal interest in the outcome.<sup>51</sup>

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47. Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: CJC, 1998) at 30, online: CJC <[www.cjc-ecm.gc.ca/cmslib/general/news\\_pub\\_judicialconduct\\_Principles\\_en.pdf](http://www.cjc-ecm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf)> [CJC, *Ethical Principles*]. See also *Wewaykum Indian Band v Canada*, 2003 SCC 45 at paras 57-59, [2003] 2 SCR 259 [Wewaykum]; Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116:1 Harv L Rev 19 at 55. The focus of this paper is the impartiality of the administrative decision-maker, specifically in relation to the trend towards a more active and directive role of the adjudicator.

48. Lorne Sossin, “An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law” (2002) 27:2 Queen’s LJ 809 [Sossin, “Intimate Approach”].

49. *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 45 [Baker]; Sossin, “Intimate Approach,” *supra* note 48 at 817.

50. Julia Hughes & Philip Bryden, “Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification” (2013) 36:1 Dal LJ 171 at 175.

51. Barak, *supra* note 47 at 59; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3; *Provincial Court Judges’ Assn of New Brunswick v New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 SCR 286; Wewaykum, *supra* note 47 at para 57; Gray, *supra* note 3 at 99; Richard Zorza, “The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear *Pro Se*: Causes, Solutions, Recommendations, and Implications” (2004) 17:3 Geo J Leg Ethics 423 at 426 [Zorza, “The Disconnect”]. Hughes & Bryden, *supra* note 50 at 179-180.

The legal test for impartiality is a long-standing one.<sup>52</sup> It was set out as follows by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information...[T]hat test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”<sup>53</sup>

Built into this legal test is a strong presumption that the decision-maker is impartial. The party alleging bias has the onus of demonstrating a reasonable apprehension of bias and the standard for doing so is high.<sup>54</sup> The legal test focuses on the perceptions of a reasonable person rather than proof of actual bias. As Bryden and Hughes explain, there are many reasons for this, including the importance of the repute of the public justice system and the practical and evidentiary difficulties associated with establishing actual bias.<sup>55</sup>

The application of the test is highly contextual and fact specific.<sup>56</sup> For an administrative decision-maker, the requisite level of impartiality (i.e., the extent of the procedural protections required) depends on a number of factors, including the nature and function of the tribunal.<sup>57</sup> Indeed, the legal test for impartiality is broadly framed around a standard of “reasonableness.” This standard invites consideration of an array of contextual factors. While the test has the advantage of being applicable to a range of circumstances, its flexibility also leads to variability in outcomes. Particularly in borderline cases, where there are valid arguments for and against recusal, decision-makers may apply the same legal test, but reach different “reasonable” conclusions.<sup>58</sup>

52. See Philip Bryden & Julia Hughes, “The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification” (2011) 48:3 *Alta L Rev* 569 at 570; Hughes & Bryden, *supra* note 50 at 172.

53. *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369.

54. *Wewaykum*, *supra* note 47 at para 174 and Adam M Dodek, “Constitutional Legitimacy and Responsibility: Confronting Allegations of Bias After *Wewaykum Indian Band v. Canada*” (2004) 25 *SCLR* (2d) 165 at 171.

55. Hughes & Bryden, *supra* note 50 at 176. See also *Wewaykum*, *supra* note 47 at paras 62-68.

56. *Wewaykum*, *supra* note 47 at paras 62-68.

57. *Baker*, *supra* note 49. This paper focuses on administrative tribunals that are adjudicative in function and that typically hold hearings before determining the cases before them.

58. Hughes & Bryden, *supra* note 50.

Some jurisdictions have created adjudicative guidelines regarding impartiality.<sup>59</sup> Although they are conceptually helpful, these guidelines provide limited practical guidance to decision-makers. In assessing impartiality, adjudicators are left with broad principles and contextual factors, but few hard or fast answers. As the Supreme Court of Canada explained in *Wewaykum*, there are no shortcuts to a contextual analysis.<sup>60</sup>

Until relatively recently, adjudicators understood the principle of impartiality to impose a strict prohibition on assisting or directing any party, including self-represented litigants.<sup>61</sup> This vision of impartiality has played an important role in shaping traditional adjudicative roles. It helps explain why, despite some of the recent trends emerging in the jurisprudence, many adjudicators remain most comfortable playing a passive role.<sup>62</sup>

Like many of our legal rules and processes, however, the traditional interpretation of “impartiality” arose from an era and mindset where representation was the norm. Our notion of impartiality was framed in a time of closer adherence to a passive and adversarial model of adjudication. However, as self-representation becomes the new norm, the ongoing validity of this approach is called into question. To put it differently: if it is unfair to expect self-represented litigants to navigate the hearing process without adjudicative assistance and direction, it is also unfair to insist on a vision of impartiality that prevents adjudicators from intervening with direction or assistance.

There is a natural tension between the traditional view of impartiality and the more active and directive role many adjudicators are adopting. The tension is perhaps most apparent in matters involving self-represented litigants, where an obligation to assist or a tendency to direct most often arises.<sup>63</sup> Self-represented litigants may cry foul because they do not like or agree with the help or direction that is being provided. They may also complain that the level of adjudicative assistance does not go far enough.<sup>64</sup>

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59. See, e.g., CJC, *Ethical Principles*, *supra* note 47 at 20: “[s]triking this balance may be particularly challenging when one party is represented by a lawyer and another is not. While doing whatever is possible to prevent unfair disadvantage to the unrepresented party, the judge must be careful to preserve his or her impartiality.” See also Goldschmidt, *supra* note 3 at 608.

60. *Wewaykum*, *supra* note 47 at para 77.

61. Engler, *supra* note 23 at 1989 and Richard Zorza, “An Overview of Self-Represented Litigation Innovation, Its Impact, and an Approach for the Future: An Invitation to Dialogue” (2009) 43:3 *Fam LQ* 519 at 529. See Denning LJ in *Jones v National Coal Board*, [1957] 2 All ER 155 at 159 (CA), citing *Yuill v Yuill*, [1945] 1 All ER 183 (CA). Goldschmidt, *supra* note 3 at 602. See also Landsman, *supra* note 3 at 245.

62. Gray, *supra* note 3 at 98.

63. CJC, *Ethical Principles*, *supra* note 47.

64. *Child and Family Services of Winnipeg v JA*, 2004 MBCA 184, 247 DLR (4th) 490 [JA].

In wading more actively into the litigation, adjudicators also risk that the opposing party will allege bias because it feels the adjudicator has gone too far to compensate for the absence of counsel.<sup>65</sup> As the Manitoba Court of Appeal put it, “balanc[ing] the sometimes competing imperatives of helping a litigant who is in need of assistance while maintaining impartiality is a recurring dilemma for [adjudicators at all levels].”<sup>66</sup>

The traditional legal test supports a vision of impartiality that is both principled and consistent with the changing adjudicative role. Rather than focusing on the tension between impartiality, on the one hand, and active adjudication and adjudicative assistance on the other, it is more helpful to conceive of all of these issues in terms of fairness. Indeed, fairness is the nodal point where impartiality and non-traditional adjudication meet. The same fairness concerns that have begun to reshape the role of adjudicators are also at the very heart of the doctrine of impartiality.<sup>67</sup>

As William Lucy has explained, there is a nexus between these two notions. In his view, impartiality does not refer simply to the attitude and role of the adjudicator, it incorporates the process through which determinations are made.<sup>68</sup> In other words, procedures that favour the represented litigant undermine the impartiality of the decision-making process. Or, as Lucy puts it, “procedural impartiality” increases the likelihood that the adjudicator will reach a merits-based or “impartial” outcome. The objective, then, is to strive for both an impartial adjudicator and an impartial decision-making process. Arguably, this is best achieved through an expanded role for the adjudicator, one in which she may play an active role to mitigate the procedural advantage generally enjoyed by represented parties.

In defining the role of the adjudicator, the governing principle should be “what is fair for all of the parties in the circumstances?” Answering this question involves considering both: the level of adjudicative assistance and direction the parties need in order to meaningfully present their case (procedural impartiality); and what, in the particular circumstances, reasonably gives rise to an apprehension that the decision-maker is biased or partial (attitude of the adjudicator). Reconciling these issues under the unifying principle of fairness leads to what I have termed the “substantive impartiality model.”<sup>69</sup> In an earlier paper, I explained that substantive

65. See Bertrand et al, *supra* note 15. See also Barrett, *supra* note 32.

66. JA, *supra* note 64 at para 32.

67. Baker, *supra* note 49 at 45. *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 625.

68. William Lucy, “The Possibility of Impartiality” (2005) 25:1 Oxford J Leg Stud 3 at 8, 23.

69. Flaherty, *supra* note 3 at 331.

impartiality borrows from the notion of substantive equality, a principle developed under section 15 of the *Charter of Rights and Freedoms*. Substantive equality does not require identical treatment of all individuals; rather, it allows for different treatment of differently situated individuals, as their particular needs and circumstances require. Similarly, substantive impartiality is not necessarily about treating parties the same, but instead about treating them fairly, or, in this context, providing self-represented litigants with the meaningful assistance and direction they need to navigate within the legal system.<sup>70</sup>

Although they do not articulate impartiality issues in terms of substantive impartiality or, as Lucy suggested, procedural impartiality, courts have shown a willingness to consider the needs of self-represented litigants as they assess impartiality. Arguably, a substantive impartiality approach fits naturally within the existing legal test because fairness considerations—including the fact that a self-represented litigant may not have meaningful access to adjudication without some assistance—are part of a contextual analysis of impartiality.

Indeed, a number of trends emerging from the case law are consistent with the notion of substantive impartiality. First, we have seen a shift away from equating impartiality to adjudicative passivity.<sup>71</sup> While adjudicators will almost always respect at least the traditional notion of impartiality, there is increasing recognition that it can get in the way of a fair hearing. Second, fairness has emerged as the guiding principle that shapes adjudicative approaches and assessments of impartiality. When they seek out the delicate balance between assistance and direction and impartiality, courts are guided by principles of fairness. For example, in *Barrett v. Layton*, the represented party asked the judge to recuse herself because she had provided “counsel-like assistance” to the unrepresented party. In that case, the judge had drawn the self-represented litigant’s attention to certain aspects of her defence (which had been drafted by her then counsel) and suggested the litigant might wish to address these issues in cross-examination.<sup>72</sup>

70. *Ibid* at 329.

71. See, e.g., *Noronha v 1174364 Ontario Ltd*, 2009 HRTO 1292 [Noronha]. *Noronha* has been cited for the proposition that the Tribunal’s active case management does not give rise to a reasonable apprehension of bias. See *Sebhatu v Starwood Canada Corp*, 2012 HRTO 329; *Ihasz v Ontario (Minister of Revenue)*, 2013 HRTO 333; *Restrepo Benitez v Canada (Citizenship and Immigration)*, 2006 FC 461, [2007] 1 FCR 107; *Hundal v Canada (Citizenship and Immigration)*, 2003 FC 884, 29 Imm LR (3d) 197; *Rajaratnam v Canada (Citizenship and Immigration)*, 2005 FC 1663, 144 ACWS (3d) 724; *Thamotharem*, *supra* note 43. For a discussion about the apparent conflict between engagement and impartiality in the US context, see Zorza, “The Disconnect,” *supra* note 51.

72. *Barrett*, *supra* note 32 at 389.

The court's conclusion that this type of assistance did not give rise to a reasonable apprehension of bias was grounded in a fairness analysis. The court explained that a fair hearing must ensure "that an unrepresented person is not denied a trial on the merits by her lack of knowledge of either the trial process or procedural and substantive law, or by the stress of appearing in court, or by a combination of these factors." According to the court, drawing the self-represented litigant's attention to certain aspects of her defence allowed for a meaningful adjudication of the claim, without compromising the fairness of the process for either party.<sup>73</sup>

Third, although framed in terms of procedural fairness rather than impartiality, active adjudicative methods have generally withstood scrutiny on judicial review. For example, cases challenging the Ontario Labour Relations Board's statutory powers, including its ability to determine a case following a "consultation" rather than a formal hearing, have been unsuccessful. It is also significant that courts have held that directive and active adjudication methods employed by that Board met the requirements of procedural fairness.<sup>74</sup>

Fourth, although now in a position to play a more active and directive role, adjudicators must nevertheless employ these techniques in a way that preserves the appearance of impartiality. To put this differently, while active adjudication and adjudicative assistance are not necessarily problematic in and of themselves, these techniques can be employed in a way that creates a reasonable apprehension of bias.<sup>75</sup> As the Court of Appeal explained in *Lennox*:

A trial judge is expected and entitled to take reasonable steps to ensure that the issues are clear, that evidence is presented in an organized and efficient manner and that the trial runs smoothly and proceeds in a timely manner. Trial judges are also entitled to intervene in the trial where there is need for clarification. However, there is a point at which judicial "intervention becomes interference and is improper."<sup>76</sup>

Consider the example of *Limoges v. Investors Group Financial Services Inc.*<sup>77</sup> Although this was a civil case of wrongful dismissal, not an administrative law matter, it nevertheless helps illustrate the distinction between permissible levels of adjudicative assistance and behaviour that gives rise to an apprehension of bias. In *Limoges*, the plaintiff was

73. *Ibid* at 391. See also *Tran*, *supra* note 8; *Lennox v Arbor Memorial Services Inc* (2001), 56 OR (3d) 795 (CA) [*Lennox*].

74. *Wright & Marvy*, *supra* note 43 at 361; *Noronha*, *supra* note 71.

75. *Limoges*, *supra* note 8.

76. *Lennox*, *supra* note 73 at para 13.

77. *Limoges*, *supra* note 8.

employed as a sales representative for approximately three years. She signed a contract stipulating that her status was that of an independent contractor and that her remuneration would be based solely on commissions from sales. After a period of probation during which she did not meet many of the company's performance benchmarks, the plaintiff's job was terminated, allegedly for cause. She sued for wrongful dismissal and unpaid commissions, representing herself at the trial.

The trial judge took a number of steps that might be characterized as assisting the plaintiff. At the beginning of the trial, the judge advised the plaintiff that her suit would best be cast as an action for unjust enrichment rather than wrongful dismissal. He then granted the plaintiff some procedural latitude, adjourning the trial to allow the plaintiff to call a witness. The judge did this although the plaintiff had not taken any steps to ensure that witness' attendance and even though the issue on which she would testify had been in dispute from the outset of the proceedings. Finally, the judge allowed the plaintiff to call two witnesses before her own cross-examination. In effect, the plaintiff's witnesses were allowed to present their evidence in the course of the plaintiff's own direct testimony.

The reviewing court did not take specific issue with any of these assistive measures. It recognized that such measures are sometimes appropriate, noting that strict compliance with the rules of evidence and procedure is not always necessary or efficacious, particularly where one or both of the parties is self-represented.<sup>78</sup> The problem in *Limoges*, and what gave rise to an apprehension of actual bias, was many of the statements the trial judge made during the course of the hearing. As the reviewing court explained:

This was a remarkable trial. The trial judge chose to ignore the rules of evidence and procedure. In addition, he failed to observe even the most basic legal principles designed to ensure a fair trial and to maintain the impartiality of the tribunal. More specifically, the trial judge made critical findings of fact before the defendant could present its evidence, or even cross-examine the plaintiff and her witnesses. He then used those premature and poorly conceived findings to threaten the defendant with punitive costs if it did not settle with the plaintiff immediately. When the defendant refused to accede to this suggestion, the trial judge denigrated

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78. *Ibid* at para 22.



the testimony of the defendant's corporate officer before he had heard it all. The trial judge's many departures from appropriate judicial conduct rendered this hearing unfair.<sup>79</sup>

In sum, we can conceive of adjudicative behaviour as lying along a spectrum, with clearly permissible behaviour at one end and clearly impermissible behaviour at the other. Conduct that falls between those two points is more difficult to assess. Although the jurisprudence provides a framework for the analysis, with "reasonableness" and "fairness" as the basis of the assessment, these are flexible terms that can accommodate a range of outcomes.

Some measure of uncertainty is inevitable, perhaps particularly in these early days of more active and directive adjudication and before a more significant body of jurisprudence develops on the issue. This uncertainty may mean that adjudicators are reluctant to embrace their "new" role, for fear of being deemed biased or unfair by a reviewing court.<sup>80</sup> For some, wading into the hearing to shape or direct it is akin to sticking one's neck out and inviting a judicial review. As one adjudicator put it to me, active adjudication "gives us one more opportunity to get something wrong."

My discussion to date has focused on active adjudication as a means of ensuring a fair hearing, particularly where representation is unbalanced. We cannot ignore, however, that for administrative tribunals, active adjudication is also a way of bringing about efficiencies. From the perspective of an administrative tribunal, active adjudication can mean shorter hearings and more efficient use of adjudicator resources. This may lead to institutional pressure on members to adjudicate actively. In the end, this too will be about balancing fairness concerns with the interests in conducting an expeditious hearing.

### III. *Self-represented litigants: Towards a better understanding of impartiality*

While the legal test for impartiality is deeply enshrined in our jurisprudence and well-known to counsel, it is far from intuitive to many self-represented litigants. Indeed, the legal test for impartiality is among the legal rules and processes that many self-represented litigants struggle to understand and apply. There is often a disconnect between what self-represented litigants

79. *Ibid* at para 6. The Ontario Court of Appeal made similar comments in the recent case of *Hazelton Lanes Inc v 1707590 Ontario Ltd*, 2014 ONCA 793, 326 OAC 301. In that case, the trial judge was found (among other things) to have made comments and interjections indicating that he had prejudged the credibility of a witness. The trial judge also made findings and gave directions that gave rise to a reasonable apprehension of bias.

80. Gray, *supra* note 3 at 98. See also Jona Goldschmidt, "How Are Courts Handling Pro Se Litigants?" (1998) 82:1 *Judicature* 13 at 15.

expect of adjudicators and how counsel and the adjudicators themselves see their role.<sup>81</sup> This disconnect may cause the self-represented litigant to question the fairness of the process and the legitimacy of the legal outcome. It can lead self-represented litigants to unreasonably claim bias, which can not only delay the adjudicative process, but can personalize the proceeding and make it more difficult for all of the parties involved.

Those who are legally trained understand and expect that adjudicators will exercise discretion in making their rulings. For self-represented litigants, however, the exercise of adjudicative discretion can feel unfair, akin to sand shifting beneath their feet. This may be particularly the case for a litigant who stayed up half the night the night before a hearing to learn a set of rules only to find that they are applied quite differently than they may have expected or understood. For example, those of us who are legally trained take for granted that procedural fairness influences how rules will be applied. While the rules may require that all documents be disclosed in advance of the hearing, adjudicators regularly admit documents that were not disclosed in accordance with the rules.<sup>82</sup> For the self-represented litigant, this can seem unfair

Self-represented litigants often view the fact that adjudicators rule on allegations of their own impartiality as a perpetuation of the unfairness. As Hughes and Bryden explain, “a party who has unsuccessfully challenged the judge’s impartiality is forced to accept what appears to be the highly subjective assessment of a judge whose impartiality, at least in the eyes of that party, is already suspect.”<sup>83</sup> It is difficult for self-represented litigants to understand that an adjudicator determining a recusal application is not acting as the judge in his or her own case.<sup>84</sup> Indeed, the case law is rife with examples of self-represented litigants who ask adjudicators to recuse themselves based on a misconception of the notion of bias.<sup>85</sup> In *Murray v. New Brunswick (Police Commission)*<sup>86</sup> Robertson J.A. spoke of a category of self-represented litigants who “operate...on the mistaken assumption that if he or she is unsuccessful on any ruling it is because

81. *McPhee v Canadian Union of Public Employees*, 2008 NSCA 104, 270 NSR (2d) 265 [*McPhee*].

82. Generally, parties would be given a reasonable time to review any such documents and, in some circumstances, it is appropriate to adjourn the hearing to give them an opportunity to do so.

83. Hughes & Bryden, *supra* note 50 at 180.

84. Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Portland, OR: Hart Publishing, 2009). Hughes & Bryden, *supra* note 50.

85. See, e.g., *Noronha*, *supra* note 71; *McPhee*, *supra* note 81, *Bialy v Public Service Alliance of Canada*, 2012 PSLRB 125; *Boshra v Canada (AG)*, 2012 FC 681, 410 FTR 240; *Doncaster v Chignecto-Central Regional School Board*, 2013 NSCA 59, 330 NSR (2d) 82; *Petty v Johnston*, 2001 ABQB 383, 105 ACWS (3d) 67; *Ross v Charlottetown (City of)*, 2008 PESCAD 6, 276 Nfld & PEIR 162; *Zivkovic v Zivkovic*, 2009 ABQB 542, 2009 AJ No 1019 (QL).

86. *Murray v New Brunswick (Police Commission)* (2012), 389 NBR (2d) 372.

of bias on the part of the decision-maker.” In some cases, this approach appears to be tactical. In others, however, it seems to stem from a genuine misunderstanding of the notion of impartiality.

Jurists are familiar with the reasonableness and fairness standards as an analytical framework. However, the concept sits less comfortably with self-represented litigants: many see themselves as the embodiment of the reasonable litigant and are astonished that their concerns about the partiality of the adjudicator are deemed to be “unreasonable.” The ongoing debate about what knowledge and experience should be attributed to the “reasonable person” can be particularly difficult for a self-represented litigant to grasp.<sup>87</sup>

To address some of the confusion and misperceptions about bias, administrative tribunals should consider adopting rules or issuing practice directions and information points for litigants wishing to raise bias allegations. Few tribunals have done so, despite the significant numbers of ultimately unfounded bias applications that tend to be brought by self-represented litigants. The challenge in constructing general guidelines arises from the flexibility of the test for impartiality, the importance of contextual factors, and the variability in “reasonable” outcomes. Nevertheless, as we have seen, some general principles do arise out of the jurisprudence. Simply making these principles known to self-represented litigants may reduce the number of frivolous recusal motions and the resulting delays and costs.

Importantly, this is not to suggest that adjudicators should engage in a discussion of these principles with litigants who are contemplating bringing bias applications. I am proposing something quite different—that administrative tribunals proactively educate parties about bias, outside the context of any particular litigation. Tribunals could prepare and make available general statements about bias, which will help all parties understand the applicable principles and processes.

Rules or practice directions of this nature could:

1. Make clear that the litigant must raise bias concerns at the earliest opportunity and that she may be deemed to have waived this right at a later stage in the proceeding. It is not generally appropriate to raise issues of bias only after the hearing is complete and the tribunal’s decision has been issued.

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87. Hughes & Bryden, *supra* note 50; Sossin, “Intimate Approach,” *supra* note 48 at 821.

2. Explain that the adjudicator herself will be tasked with determining the bias allegation.<sup>88</sup> Explaining to litigants that this is the normal procedure may help to dispel fairness concerns and, at a minimum, the role of the adjudicator will not come as a surprise to them. The litigant will understand that all parties who raise issues of bias are treated in this manner.
3. Set out the legal test for impartiality and explain (in general terms) how it has been applied. For example, the practice direction should explain that just because one disagrees with the adjudicator's decision does not mean that he or she was biased. The practice direction might provide some examples from the tribunal (or from the reviewing court's) case law of where bias was and was not established.
4. Explain that, in order to ensure fairness for both parties, the adjudicator may provide some degree of assistance to litigants, particularly if they are self-represented. It should explain that its objective is not to help a party succeed, but to ensure that both parties have access to a fair hearing. Again, the practice direction could refer to examples from the jurisprudence and explain that the adjudicator's involvement will be assessed based on whether it gives rise to a reasonable apprehension of bias.
5. To the extent that the tribunal uses active adjudication, the practice direction should explain that using this model of adjudication does not necessarily lead to a reasonable apprehension of bias, although the adjudicator's comments and behaviour will be assessed on the basis of whether they reasonably gave rise to an apprehension of bias.

### *Conclusion*

The increasing presence of self-represented litigants and emerging trends in adjudicative roles call out for a rethinking of the notion of impartiality. The role of the adjudicator and the principles that define that role must be alive to the needs and reality of increasing numbers of self-represented litigants. If, as the courts have held, it is unfair to expect self-represented litigants to navigate legal processes without assistance and direction, it is also unfair to adopt on a vision of impartiality that prevents adjudicators from providing that help and direction.

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88. Some have suggested that this approach should be rethought and that, in some circumstances, it is appropriate to refer allegations of bias to another adjudicator for decision. For a critical discussion of this issue see Hammond, *supra* note 84 at 82-84.

Increasingly, a contextual and “substantive” approach to impartiality is emerging from the jurisprudence. Impartiality is no longer about treating all parties with the same neutral passivity. Instead it is about fairness and the needs of the particular litigants—we now recognize that adjudicators are not biased simply because they provide self-represented litigants with the assistance and direction they need to present their case to the best of their ability.<sup>89</sup> While this is an important shift, it comes with challenges of its own. In particular, although the jurisprudence tells us that some measure of assistance and direction is generally deemed to be appropriate,<sup>90</sup> it can be difficult to assess just how much direction or assistance is too much. Determining what creates a reasonable apprehension of bias is a challenging issue for jurists and courts, especially as they grapple with emerging trends in adjudication. The issue can be especially difficult for self-represented litigants.

While there are no bright lines that delineate impermissible adjudicative conduct, some broad principles have emerged from the jurisprudence. Many of these principles are nuanced and others are still in the process of unfolding. It is important to help self-represented litigants understand at least the basic principles that govern adjudicative behaviour and the obligation to remain impartial. Educating self-represented litigants about bias may not only reduce the number of frivolous bias motions and the resulting delays and waste of adjudicative resources, it may also improve litigants’ confidence in the administrative justice system. Informing litigants of the process for raising bias and explaining some of the applicable principles may enhance their confidence in the process and the sense that they have been treated fairly. To this end, administrative tribunals should consider preparing practice directions, rules, or information points about impartiality, which address the process and timing for raising allegations of bias, and provide examples from the jurisprudence to illustrate some of the basic principles.

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89. Flaherty, *supra* note 3 at 329.

90. Freya Kristjanson & Sharon Naipaul, “Active Adjudication or Entering the Arena: How Much is Too Much?” (2011) 24 Can J Admin L & Prac 201.